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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska (R. 65–69) is reported in 25 F. (2d) 746. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 391) is reported in 32 F. (2d) 1.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 25, 1929. (R. 397.) A timely petition for rehearing filed in behalf of the petitioner on May 16, 1929 (R. 398), was denied on May 29,

1929 (R. 399). Petition for certiorari was filed August 23, 1929. Certiorari was granted October 21, 1929. (R. 402.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 278 (d) of the Revenue Act of 1926, or any other statutory provision limiting the time within which a proceeding may be brought by the United States for the collection of taxes imposed under the Revenue Act of 1917, have any application to a suit in equity brought under the "trust fund theory" against the stockholders of a dissolved corporate taxpayer for money received to the use and benefit of the United States?

2. Even if it be held that a statute of limitations relating to proceedings to collect taxes imposed by the Revenue Act of 1917 applies to this suit in equity, does Section 278 (d) of the Revenue Act of 1926 constitute a bar to the proceeding, in view of the fact that the required returns were not filed and in the absence of such returns the assessment could be made, in the language of that Revenue Act, "at any time"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations will be found in an appendix to this brief.

STATEMENT OF FACTS

The Updike Grain Company, a corporation organized under the laws of the State of Nebraska, was dissolved during the month of August, 1917, and its assets were distributed to its stockholders ratably so that each stockholder received in cash or its equivalent at least $100 for each share of stock owned. (R. 9, 10, 12, 17, 29, 115, 127.) The paid-up capital stock of the corporation at the time of its dissolution was $2,000,000. (R. 5, 12, 17, 22.)

Prior to the passage of the Revenue Act of October 3, 1917, hereinafter referred to as the Revenue Act of 1917, the corporation filed income-tax and excess-profits tax returns for the eleven-month period ended June 30, 1917, these returns being rendered in accordance with the provisions of the Revenue Acts of September 8, 1916, and March 3, 1917. (R. 163–171.) An amended excess-profits tax return for the same period was filed September 28, 1917, this return likewise being prepared in accordance with the provisions of the earlier statutes. (R. 175.)

On October 3, 1917, the Revenue Act of 1917 was passed and shortly thereafter the Commissioner of Internal Revenue issued a regulation, Article 61 of Regulations 33 Revised (see Appendix), providing that corporations which had dissolved in 1917 prior to the passage of that Act should file income and excess-profits tax returns in accordance with the provisions of the Revenue Act of 1917 for the

period preceding dissolution, and that the taxes previously paid for such period would be credited against the amount due on such returns.

A blank return form revised under the Revenue Act of 1917 was mailed to the corporation and was returned to the collector's office without being filled in or signed, together with a letter from Gorton Roth, former secretary of the Updike Grain Company, stating that the corporation had filed income and excess-profits tax returns prior to its dissolution, that it had been dissolved and had distributed its assets and that he was aware of the provisions of Article 61 of Regulations 33, but was advised that it was erroneous. (R. 87–95.) No returns were ever filed by or in behalf of the corporation under the Revenue Act of 1917. (R. 147–148.)

During October, 1918, the Commissioner had a revenue agent investigate the tax liability of the Updike Grain Company. As the result of his report additional income and excess-profits taxes in the sum of $373,911.54 were assessed for the eleven-months period ended June 30, 1917. (R. 8–9, 14–15, 18–19, 23, 95–97, 143–147, 212–213.) The assessment in question was made on the January, 1920, assessment list. (R. 212–213.)

In connection with this investigation the revenue agent prepared returns. (R. 96.) The evidence is in dispute as to whether these returns were presented to former officers of the company for verification but not as to the fact that they were never

signed or verified by the officers. (R. 96, 115, 121, 349, 350.)

Notice and demand for payment of the tax in question was mailed to the Updike Grain Company on February 10, 1920. (R. 299.) No part of the amount has been paid. (R. 147.) No suit or proceeding to collect the amount has been instituted against the dissolved corporation nor was any suit or proceeding instituted against its former stockholders until the present suit in equity was begun against them in 1927 under the "trust fund" doctrine to recover funds received by them to the use of the United States through their receipt of assets of the corporation prior to its payment of income and excess-profits taxes due for the period ended June 30, 1917.

The principal defense interposed was that the action, although a suit to recover "trust funds," was barred by provisions of the Revenue Act of 1926 limiting the time within which the Government might institute proceedings for the collection of taxes. This defense was sustained by the trial court which held that the revenue agent's report was a return, the filing of which served to set in motion the five-year period of limitations upon the assessment of taxes due under the Revenue Act of 1917; that the assessment made in January, 1920, was made "within the statutory period of limitation" properly applicable thereto within the meaning of Section 278 (d) of the Revenue Act of 1926,

and that under that section this suit against the respondents to recover "trust funds" was barred because not commenced within six years after the assessment in January, 1920. (R. 65–69.)

On April 13, 1928, the District Court entered its decree dismissing the bill at the plaintiff's costs and on May 2, 1928, entered a decree which modified its previous decree only as to costs. (R. 69.) Thereupon by petition for appeal allowed May 2, 1928 (R. 76), the petitioner brought the case to the Circuit Court of Appeals for the Eighth Circuit. That court affirmed the decision of the trial court, holding that the suit was barred under Section 278 (d) although it conceded that the case was a "no return" case. It based its decision chiefly on the ground that in enacting Section 278 (d) of the Revenue Act of 1926, Congress intended that the Government's right to collect taxes by suit should be limited to six years from the time of the assessment, even where no returns were filed and the assessment could be made "at any time." (R. 394–396.) This Court granted certiorari on October 21, 1929.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In holding that Section 278 (d) of the Revenue Act of 1926, limiting the time within which the petitioner might institute a proceeding to collect income and excess-profits taxes imposed upon the Updike Grain Company by the Revenue Act of

1917, was applicable to and constituted a bar to this suit in equity brought against the respondents as stockholders of the dissolved corporation under the "trust fund theory."

II. In holding that, where no returns for the fiscal period ending June 30, 1917, were filed by the corporation as required by the provisions of the Revenue Act of 1917 and the regulations of the Treasury Department, any proceeding of the Commissioner to collect taxes imposed by that Act would be barred within six years from the time the assessment was made by the provisions of Section 278 (d), *supra*.

SUMMARY OF ARGUMENT

I. Section 278 (d) of the Revenue Act of 1926 limiting the time after assessment within which the Government may institute proceedings to collect taxes imposed under the Revenue Act of 1917 and other Revenue Acts expressly relates only to proceedings to collect taxes *qua* taxes and not to suits in equity to recover "trust funds." That Congress intended Section 278 (d) of the Revenue Act of 1926 to be so restricted is indicated by the fact that in Section 280, authorizing the Commissioner to notify transferees of corporate assets of deficiencies in tax against the corporation and giving them the right of appeal to the Board of Tax Appeals, specific statutes of limitation were enacted. If the general statutes of limitation in the Revenue Act of 1926 do not apply to proceedings under Section 280, they should

not apply to this proceeding which was not brought under the Revenue Act but was instituted under general equitable principles.

Nor can the applicability of Section 278 be maintained on the theory that the stockholders and the corporation are identical for taxation purposes, for that is not the rule.

The question is whether, notwithstanding the fact that Section 278 (d) of the Revenue Act of 1926 does not in express terms relate to this proceeding, it is nevertheless controlled by the same statute of limitations as would apply to a suit against the corporate taxpayer to recover the tax. *Russell* v. *United States,* 278 U. S. 181, is not authority on this issue for the question was not raised or decided in that case although it existed in the record.

The case is controlled in principle by *United States* v. *John Barth Co.,* 279 U. S. 370, and other decisions recognizing that where two independent remedies exist, the barring of one remedy does not bar the other.

In the instant case the cause of action against the stockholders of the Updike Grain Company was an independent cause of action which accrued only when the corporation dissolved and distributed its assets to its stockholders without paying taxes due the United States. The only statute of limitations which would apply to such action would be one enacted with specific reference to this independent cause of action and none has been cited.

II. Even if it be conceded that the same statute of limitations is applicable to a suit against the stockholders as would have applied to a suit against the corporation, the present proceeding is not barred. Section 278 (d) of the Revenue Act of 1926 does not limit the Government's right to collect the tax to a period of six years after the assessment except in cases where the assessment has been made "within the statutory period of limitation properly applicable thereto." The five-year period of limitation upon the assessment of taxes imposed under the Revenue Act of 1917 is limited to cases where a bona fide return has been filed by the taxpayer. Where the required return has not been filed the assessment can be made "at any time." The Circuit Court of Appeals conceded that this was a "no return" case. Hence, the assessment which was actually made in January, 1920, could have been made "at any time."

An assessment which can be made at any time does not come within the operation of Section 278 (d), and there is no statute of limitations as to the collection of such an assessment. It was the purpose of Congress in enacting Section 278 (d) to lengthen and not to shorten the period of limitations. To construe the Act as it has been construed by the Circuit Court of Appeals in this case would have the opposite effect and would bar retroactively the right of the Government to institute a suit which except for the passage of the Act

could have been brought at any time. Such a construction is contrary to the rule that a statute should not be construed to change the status of existing claims unless the legislative intent to do so is clear, and also to the rule that the United States is not bound by a limitation provision unless the intent that it shall be is clear.

ARGUMENT

I

NEITHER SECTION 278 (D) OF THE REVENUE ACT OF 1926 NOR ANY STATUTE PLACING A PERIOD OF LIMITATION UPON THE RIGHT OF THE UNITED STATES TO COLLECT TAXES IMPOSED UNDER THE REVENUE ACT OF 1917 IS APPLICABLE TO THIS SUIT IN EQUITY TO RECOVER TRUST FUNDS FROM THE FORMER STOCKHOLDERS OF THE UPDIKE GRAIN COMPANY AS TRANSFEREES OF ITS ASSETS

The courts below have held that the present suit in equity against the former stockholders of the Updike Grain Company is barred by Section 278 (d) of the Revenue Act of 1926 because not instituted within six years after income and excess profits taxes were assessed against the corporation.

The Government contends that neither Section 278 (d) of the Revenue Act of 1926, nor any other statute of limitations relating to proceedings for the collection of taxes, applies to a suit in equity brought to recover "trust funds," and that the Circuit Court of Appeals erred in relying upon *Russell* v. *United States*, 278 U. S. 181, as authority to the contrary.

The *Russell case, supra,* can not be said to have decided the question whether the statute of limitations relating to proceedings for the collection of taxes applies to a suit against the transferees of the assets of a dissolved corporation. It is true that the question existed in the record in the *Russell case,* but it was not raised or considered either in this Court or in the courts below. In these circumstances this Court can not be said to have decided it.

In *United States* v. *Mitchell,* 271 U. S. 9, 14, this Court said:

> It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall,* 266 U. S. 507, 511.

See also *Louisville Trust Co.* v. *Knott,* 191 U. S. 225; *New* v. *Oklahoma,* 195 U. S. 252.

It is clear that Section 278 (d) of the Revenue Act of 1926 does not in express terms relate to a proceeding in equity against the stockholders of a dissolved corporation. It provides merely that if an assessment of income and profits taxes under that Act or previous Acts meets certain requirements (discussed hereinafter), then "such tax may be collected by distraint or by a proceeding in court," provided it is begun "(1) within six years after the assessment of the tax" or "(2) prior to the

expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

The "proceeding in court" to which this provision relates is a direct proceeding to collect taxes *qua* taxes from those persons upon whom liability has been directly imposed. This is borne out by the use of the expression "such tax may be collected," and by the extension of the six-year period in the case of an agreement between the Commissioner and "the taxpayer." The term "taxpayer" is defined in Section 2 (a) (9), *infra*, p. 43, as any person "subject to a tax imposed by this Act." The taxes here involved were imposed upon the corporation. (R. 8–9.)

That Section 278 (d) of the Revenue Act limiting the time after assessment within which the Government may institute a proceeding to collect a tax refers only to a direct proceeding against the taxpayer finds further support when consideration is given to the provisions of Section 280. That section prescribes a procedure whereby a notice of deficiency in corporation taxes may be sent directly to the transferee of the assets of a corporate taxpayer, the transferee in such case being given the right of appeal to the United States Board of Tax Appeals. It is significant that in enacting this provision Congress did not refer to the transferees as taxpayers or designate their responsibility for the tax as a tax liability, but referred to it as "the liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the

tax * * * imposed upon the taxpayer," thus clearly differentiating taxpayers from transferees.[1]

In enacting Section 280, moreover, Congress, apparently realizing that the previous sections of the law which prescribed limitation periods as to the collection of taxes *qua* taxes would have no application to this new and additional remedy, deemed it necessary to create in that section a separate and distinct period of limitation within which the assessment of the liability of transferees may be made and proceedings for the enforcement of such liability instituted. The taxpayer has not urged that these limitation provisions of Section 280 apply to this proceeding and it is clear that they do not apply where no notice of the deficiency in corporate taxes has been mailed to the transferee and he has not been given an opportunity to appeal to the Board of Tax Appeals.

On the contrary the taxpayer has contended and the courts below have held that the general statutes

[1] The courts below have recognized that in view of the provisions of Section 1122 (b) of the Revenue Act of 1926, *infra*, p. 48, the remedy provided in Section 280 is not exclusive and that the Government has not thereby been deprived of its rights to proceed against the transferees of corporate assets by a suit in equity brought independently of Section 280. The District Court for the District of Massachusetts reached the same conclusion in *United States* v. *Greenfield Tap & Die Corporation*, 27 F. (2d) 933. Section 1318 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1148; Section 1310 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 310; and Section 1025 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 348, contain provisions which are identical with Section 1122 (b) of the Revenue Act of 1926.

of limitation relating to *taxpayers* govern this proceeding. But if, in the absence of specific provision, the general statutes of limitation in the Revenue Act of 1926 would not be applicable to proceedings against transferees under Section 280, it seems that they would likewise not apply to this suit which has not been brought in accordance with the procedure prescribed under Section 280, or under any other provision of the Revenue Act, but has invoked, to quote the Circuit Court of Appeals, "the plenary powers of courts of equity." (R. 396.)

That Congress has continued to treat the liability of transferees as distinct from the liability of taxpayers is further shown by the enactment of Section 604 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873 (U. S. C. Sup. III, Title 26, Sec. 2604), prohibiting suits to restrain the enforcement of the liability of transferees under Section 280 of the Revenue Act of 1926, as amended. If a proceeding to enforce such a liability constituted a proceeding to collect taxes, then Section 3224 R. S. (U. S. C., Title 26, Sec. 154) would effectively prevent a suit to restrain the proceeding against the transferees and Section 604 would serve no useful purpose. *Cf. Owensboro Ditcher & Grader Co.* v. *Lucas,* 18 F. (2d) 798.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Routzahn* v. *Tyroler* (C. C. A. 6th), 36 F. (2d) 208, may be cited

by the respondent as establishing the principle that "transferees" are "taxpayers" within the meaning of the Revenue Acts. The court there said (p. 209):

> Upon the basis of these same assumptions, plaintiffs-appellees urge that the opportunity to be heard by the transferee ended with the Board of Tax Appeals, and that the absence of any further opportunity for hearing constitutes a lack of due process under the Fifth Amendment. We think this argument fails because, in our judgment, the transferee has the right to have the whole matter heard by the Circuit Court of Appeals in the exercise of its power to review (section 1001, Revenue Act of 1926, section 1224, title 26, USCA); and, where a statute expressly gives a right to judicial review of an administrative order before the order can be enforced, there is no room to invoke the "due process" clause. *Ben Avon Case,* 253 U. S. 287, 289, 40 S. Ct. 527, 64 L. Ed. 908; *State of Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 41, 46, S. Ct. 384, 70 L. Ed. 818. It is true that this right of review is expressly given only to the "tax payer" (section 1224, tit. 26, USCA), and that this term is so defined in the act (see section 1262 (a) (9), tit. 26 USCA), that doubt would naturally exist whether it was intended to include the transferee from whom the tax was being collected; but, even as restricted by this definition, the term "tax payer" is not seriously inaccurate when applied to the involuntary payer of the tax

> debt, and he has before the Board the rights of a taxpayer. See section 602 (913, Revenue Act of 1928 (26 USCA Sec. 1230). True, the contrary inference would follow, from the opinion of the majority of the Board in the *Cappellini Case,* 14 B. T. A. 1269, but we cannot agree that any estoppel arises, as the Board there thought. To say that an act may impose an unconstitutional liability and forbid all judicial review except in one way, and then that one who appeals for review in the way provided for him thereby estops himself to deny the validity of the imposition, is, to our minds, an obvious solecism.

It is believed that this language should not be taken to mean that the court considered that "transferees" were "taxpayers" but only that they were *treated* as taxpayers under Section 280 for the purpose of appellate review of the decision of the Board. That interpretation was adopted to avoid the decision of a constitutional question under the due process clause of the Fifth Amendment. The language quoted above should be read in the light of the fact that the suit was brought to secure an injunction against the enforcement of the liability of transferees and that the court in holding that an injunction would not lie did not rely upon Section 3224 R. S. prohibiting a suit to enjoin the collection of a tax, but relied on the fact that the transferees had an adequate remedy by virtue of the right given them under Section 280 to appeal to the Board of

Tax Appeals and to secure a review of an adverse decision of the Board by the Circuit Court of Appeals.

Nor can the conclusion that the limitation contained in Section 278 (d) should apply to a proceeding in equity against the former stockholders of a dissolved corporation be reached on any theory that the corporation and its stockholders are one. This Court has repeatedly held that a corporation must be regarded for purposes of taxation as an entity separate and distinct from its shareholders, and that a statute imposing a liability upon the corporation does not impose a liability upon stockholders. *Van Allen* v. *The Assessors,* 3 Wall. 573; *Park Bank* v. *Remsen,* 158 U. S. 337; *Eisner* v. *Macomber,* 252 U. S. 189; *Cullinan* v. *Walker,* 262 U. S. 134.

An obligation resting upon an individual to pay the United States a sum of money, not because he had a net taxable income and was a "taxpayer" *subject to tax imposed by a Revenue Act*, but because in some way independently of any revenue law a different liability, albeit growing out of a tax, has attached to him, is not a tax liability. The liability of the stockholders in this case did not arise simultaneously with the imposition of the tax against the Updike Grain Company and would never have arisen if they had not received assets of the corporation (upon its dissolution) prior to the satisfaction of its tax liability. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, cer-

tiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227. A suit to enforce a liability for taxes *qua* taxes against the stockholders would amount to an endeavor to take one person's property to pay another's taxes in violation of the due-process clause of the Constitution. *Cf. Frick* v. *Lewellyn,* 298 Fed. 803; affd. 268 U. S. 238.

If it be admitted that the statute does not in express terms relate to a proceeding in equity of this kind, the question is whether, notwithstanding such fact, the proceeding is necessarily controlled by the same statute of limitations as would control a direct suit to collect the tax. As previously stated, that question existed in the record in the *Russell case, supra,* but was not raised or decided there.

The question has also existed but was not raised or considered in a number of other decisions where the Government has proceeded against the stockholders of dissolved corporations who received the assets of such corporations prior to the satisfaction of the corporations' debts for taxes. *Updike* v. *United States, supra; United States* v. *Whyel* (C. C. A. 3rd), 28 F. (2d) 30; *United States* v. *Pann* (S. D. Cal.), 23 F. (2d) 714; *United States* v. *Armstrong, supra.*

In their brief in opposition to the petition for certiorari, respondents have relied upon *United States* v. *Lazenby* (N. D. Texas), 5 F. (2d) 827, and *United States* v. *Snook* (N. D. Ga.), 24 F. (2d) 844, and upon certain rulings of the Bureau of In-

ternal Revenue and decisions of the Board of Tax Appeals as authority on the issue whether a statute of limitations governing proceedings to collect taxes is applicable to a suit in equity such as the suit at bar. As to the Bureau rulings and Board decisions relied upon, it is sufficient to point out that they were all decided with reference to proceedings against transferees under Section 280 of the Revenue Act of 1926 which contained specific provisions as to the limitation periods governing such proceedings and that they are not in point on the issue involved in this suit instituted independently of the Revenue Act. Moreover, the Commissioner has not acquiesced in *Hynes* v. *Commissioner*, 16 B. T. A. 1272, and has carried that case to the Circuit Court of Appeals for the Eighth Circuit.

No decision has been cited by respondents which may be considered as controlling on this issue. The *Lazenby case* was decided before Congress showed through the enactment of Section 280 that it did not consider general statutes of limitation to be applicable to suits against the transferees of corporate assets. The *Snook case* was decided on other grounds by the Circuit Court of Appeals for the Fifth Circuit (*Austin* v. *United States*, 28 F. (2d) 677) and is not entitled to great weight. It is also distinguishable on the facts, for a return was filed in that case and since the statute of limitations had not run against the corporation it was not necessary to decide whether it could have barred a suit against the transferees.

It is the contention of the Government that the correct solution of this question is to be found in those cases which hold that where two remedies exist, even though one be barred, the other is unaffected. An example of this doctrine is afforded by the cases holding that a statute limiting the time for a suit to annul land patents has no application to a suit to recover the value of such lands as damages for their fraudulent acquisition. *United States* v. *Whited & Wheless,* 246 U. S. 552; *Southern Pacific* v. *United States* (*No. 1*), 200 U. S. 341; *Pitan* v. *United States* (C. C. A. 8th), 241 Fed. 364. This Court has applied the same principle to an action to recover money paid by mistake. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112; *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190.

A case which is more nearly parallel to the one at bar is *Talcott* v. *United States* (C. C. A. 9th), 23 F. (2d) 897, certiorari denied, 277 U. S. 604. There the Government interposed a counterclaim for the recovery from the plaintiff of a sum which had been refunded by mistake by the Commissioner. The plaintiff urged that the counterclaim was barred by the statute of limitations contained in the Revenue Act of 1926. The court held, however, that the counterclaim was not "a proceeding for the collection of taxes," and that it was not barred.

The principle has more recently been applied by this Court in *United States* v. *John Barth Co.,* 279

U. S. 370, wherein it was held that a suit brought by the United States upon a bond given to secure the payment of a tax was not barred by the statute limiting the time within which a suit must be brought for the collection of the tax. This Court said (p. 375):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective.

By analogy, a provision in the Revenue Act limiting the time within which the United States may bring a proceeding against a corporate taxpayer for the collection of corporation income and excess-profits taxes does not apply to this suit in equity brought against the stockholders of such corporation after its dissolution and the distribution of its assets to its stockholders without the satisfaction of the corporation income and excess-profits taxes due the United States.

It is true that in the *Barth case* the independent remedy was founded upon a written contract and

that there is no written contract in this case, but we contend that that fact does not distinguish the cases in principle. There was no contract in the *Talcott case, supra,* and there the Circuit Court of Appeals said (p. 901):

> It is contended that recovery upon the defendant's counterclaim is barred by the statute of limitations, and reference is made to the Revenue Act of 1926, which provides (44 Stat. 114 (26 USCA Sec. 105)) that all revenue taxes, with certain exceptions, shall be assessed within four years after such taxes become due "and no proceedings in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes become due." But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

We submit that the test under the *Barth* and *Talcott decisions* is whether the remedy against the stockholders exists independently of any right which the Government may have or might have had against the corporation for the collection of taxes; that the action against the stockholders is an independent remedy under those tests; and that no statute of limitations other than one barring that particular remedy can be raised as a defense.

The theory under which the Government or any other creditor proceeds against the stockholders of

a corporation to secure the satisfaction of a corporate liability has often been expressed by stating that the corporate assets constitute a trust fund for its creditors. *Mumma* v. *Potomac Co.*, 8 Pet. 281; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Curran* v. *State of Arkansas*, 15 How. 304; *Sanger* v. *Upton*, 91 U. S. 56; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603.

In other instances this Court has not taken the broad view that the assets of a corporation at all times constitute a "trust fund" for its creditors, but it has nevertheless held that, after a corporation has been dissolved and has distributed its assets to its stockholders without the satisfaction of its debts, a creditor of the corporation may recover from the stockholders the amount of his debt to the extent of the assets distributed to them. *Graham* v. *Railroad Co.*, 102 U. S. 148; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald* v. *Williams*, 174 U. S. 397; *Pierce* v. *United States*, 255 U. S. 398.

In the brief in opposition to the petition for certiorari (p. 8) it is suggested that a suit against the stockholders of a dissolved corporation is dependent upon the recovery of a judgment against the corporation and the return of an execution, unsatisfied, and that for that reason the right against the stockholders is not to be regarded as an independent remedy. As authority for the necessity of recovering a judgment against the corporation, there are cited *Pierce* v. *United States, supra*, and

Merchants Nat. Bank of Omaha v. *McDonald*, 63 Neb. 363.

The decisions of the courts on the question as to whether it is necessary to secure a judgment against the corporation where, as here, the corporation has been dissolved have not been harmonious. Where the "trust fund" doctrine has been approved, it is recognized that it is unnecessary to secure a judgment against the corporation before proceeding against the stockholders. *Terry* v. *Anderson*, 95 U. S. 628; *McWilliams* v. *Excelsior Coal Co.* (C. C. A. 8th), 298 Fed. 884. See also *Case* v. *Beauregard*, 101 U. S. 688. On the other hand where the "trust fund" doctrine has not been applied and the proceeding against the stockholders has been treated as any other creditor's bill, it is a general rule that a judgment must be secured against the corporation and execution returned unsatisfied before suit against the stockholders may be instituted. *Pierce* v. *United States, supra; Hollins* v. *Brierfield Coal & Iron Co., supra.*

To this rule, however, there are exceptions. In the *Pierce case, supra,* this Court held that it was not necessary to show a return of execution *nulla bona* within the district where the suit is brought if it is agreed that the debtor had no property out of which the judgment could have been satisfied at law. In the *Merchants National Bank case, supra,* upon which the respondent also relies, the Supreme Court of Nebraska recognized that exceptions exist.

The rule itself is apparently based on the theory that equity has no jurisdiction to enforce a simple contract debt and that before applying for relief in equity the creditor must acquire an interest in the corporate property or equitable jurisdiction must be established on other grounds, as, for example, where the obtaining of a judgment against the corporation would be a futile step in the process of collection. *Flash* v. *Conn,* 109 U. S. 371.

In cases brought by the United States to enforce the liability of stockholders arising from their receipt of corporate assets prior to the satisfaction of its tax liability, it has been assumed that it is not necessary to secure a judgment against the stockholders. In *United States* v. *Fairall,* 16 F. (2d) 328, and in *Updike* v. *United States,* 8 F. (2d) 913, it was held that it was unnecessary to secure a judgment against the corporation under such circumstances.

Whether or not there is a trust in a strict sense, and whatever the precise nature of this liability, it is generally held that in any case where the liability of the stockholders of a corporation for its debts arises only by reason of the insolvency or dissolution of the corporation, the right to proceed against the stockholders is a new and independent remedy. *McDonald* v. *Thompson,* 184 U. S. 71; *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Terry* v. *Anderson, supra; Terry* v. *Tubman,* 92 U. S. 156; *George* v. *Wallace* (C. C. A. 8th), 135 Fed. 286; *United States* v. *Armstrong, supra.*

That the cause of action which the creditors of a corporation acquire against its stockholders upon the dissolution or insolvency of the corporation is a distinct cause of action is also shown by cases involving State statutes which create such a liability without prescribing the form of the remedy. In such cases it is held that the form of action to be employed is that which is appropriate to the nature of the liability created by the statute, whether it be a suit in equity, action on the case, assumpsit or debt. *Mills* v. *Scott*, 99 U. S. 25; *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Little*, 101 U. S. 216; *Flash* v. *Conn*, *supra;* Thompson on Corporations (3d ed.), Vol. 6, Sec. 5105.

In none of these authorities, nor in any decided case which has been found, has it been held that the form of the action against the stockholders is controlled by the nature of the original claim against the corporation.

It is also well settled that where the stockholders of a corporation become liable for its debts only upon the insolvency or dissolution of the corporation, whether by statute or by equitable principles, the cause of action against them does not arise and the statute of limitations does not begin to run against them until the happening of the event—that is, insolvency or dissolution—which makes them liable. *Terry* v. *Tubman*, *supra; Carrol* v. *Green*, *supra; Terry* v. *McLure*, 103 U. S. 442; *Taylor* v. *Bowker*, 111 U. S. 110; *Bernheimer* v. *Converse*, 206 U. S. 516; *Richards* v. *Carpenter*

(C. C. A. 6th), 261 Fed. 724; Clark and Marshall, Private Corporations, Vol. 3, p. 2631; Thompson on Corporations, (3d ed.), Vol 7, Secs. 5219–5231. Under this rule it is plain that there can be no statute of limitations which runs concurrently against a corporation and its stockholders. See *Crissey* v. *Morrill* (C. C. A. 8th), 125 Fed. 878.

Moreover, the statute of limitations which governs a suit against the stockholders of a corporation to enforce a right against them which arises upon the insolvency or dissolution of the corporation is the statute applicable to the particular form of action under which the remedy against the stockholders is pursued. *Mills* v. *Scott, supra; Terry* v. *Tubman, supra; Fourth National Bank* v. *Francklyn,* 120 U. S. 747; *Carrol* v. *Green, supra; Platt* v. *Wilmot,* 193 U. S. 602; *Crissey* v. *Morrill, supra; Boyd* v. *Mutual Fire Asso.,* 116 Wis. 155; *Bourne* v. *Baer,* 107 Neb. 255; Clark and Marshall, Private Corporations, Vol. 3, pp. 2627–2630.

In none of the cases cited nor in any case relied on by the respondents in their brief in opposition to the petition for certiorari has it been held that the statute of limitations which would control a suit against the stockholders of a corporation to enforce a liability arising as the result of the insolvency or dissolution of the corporation is the statute which would govern a suit against the corporation. That the stockholders' liability is not controlled by the statutes of limitation relating to the corporation is recognized in *Mills* v. *Scott, supra; Van Hook* v.

Whitlock, 3 Paige (N. Y.) 409; *Powell* v. *Oregonian Ry. Co.,* 38 Fed. 187; Clark and Marshall, Private Corporations, Vol. 3, pp. 2631–2635.

In the *Oregonian Ry. Co. case,* where a judgment was obtained against a corporation for waste, and an action was brought against the stockholders to subject the unpaid balance of their stock to the payment of the claim, it was held that the cause of action against the stockholders accrued when the corporation became insolvent, and that the applicable statute of limitations was the one which related to contracts, express or implied, and not that relating to actions for waste.

The decisions recognizing that a different statute of limitations applies to causes of action accruing to creditors against the stockholders, after the insolvency or dissolution of a corporation, are aided by cases which recognize that in such actions the stockholders may avail themselves of defenses which would not be available to the corporation in a suit against it. This Court in *Ward* v. *Joslin,* 186 U. S. 142, held that a stockholder could interpose the defense of an *ultra vires* contract, which, because of benefits received by it under the contract, the corporation could not have done if it had been sued. Similarly, in *Ramsden* v. *Knowles,* 151 Fed. 718, it was held that where the right of a creditor of a foreign corporation to enforce a statutory liability of stockholders was fixed on the dissolution of the corporation, such liability was not affected by the subsequent extinction of the creditor's remedy

against the corporation. In *Close* v. *Potter,* 155 N. Y. 145, the court took the view that an action by a creditor to charge a stockholder of a corporation for a debt represented by a promissory note was not governed by rules controlling commercial paper and the fact that the plaintiff was a *bona fide* holder would not prevent the defendant from setting up defenses which the corporation could not, the cause of action being entirely independent. *Cf. Dickinson* v. *Kline,* 96 Neb. 435; *McWilliams* v. *Excelsior Coal Co.* (C. C. A. 8th.), 298 Fed. 884.

In view of these well-established principles governing suits in equity similar to this proceeding, it is submitted that the right of the United States to proceed against the stockholders of the Updike Grain Company was an independent remedy not controlled by any statute of limitations which might have applied to a suit against the corporation for the collection of taxes. The only statute of limitations which would apply to such action would be one enacted with specific reference to this independent cause of action and none has been cited.

II

EVEN THOUGH IT SHOULD BE CONCEDED THAT THE DEFENSE OF A STATUTE OF LIMITATIONS RELATING TO THE COLLECTION OF TAXES WAS AVAILABLE TO THE RESPONDENTS, SUCH DEFENSE FAILS IN THIS CASE FOR THE REASON THAT THE RETURNS REQUIRED BY LAW HAVE NOT BEEN FILED, WITHOUT WHICH NO STATUTE OF LIMITATIONS HAS BEEN SET IN MOTION

Conceding for the sake of argument that the same statutes of limitations are applicable to this pro-

ceeding as would be applicable if it were a suit against the corporation to collect the taxes involved, the Government's position is that under the facts of the case the suit is not barred.

The particular statute of limitations which the court below held to constitute a bar to a direct proceeding against the Updike Grain Company for the collection of taxes is Section 278 (d) of the Revenue Act of 1926 (p. 46, *infra*). The Circuit Court of Appeals in effect has held that in this section Congress prescribed a period of six years after assessment for the collection of all taxes imposed under that Act or under prior Revenue Acts, subject only to the proviso that the assessment must not have been barred when made. It has concluded that the assessment in 1920 in this case was not barred when made and hence that the time for bringing suit expired in 1926, prior to the institution of the suit in 1927.

It is submitted that the language of Section 278 (d) should not be so broadly construed. The provision is that the period of six years shall apply when the assessment has been made (whether before or after the enactment of the Act) "within the statutory period of limitation properly applicable thereto." A requirement that an assessment shall not have been barred when made and a requirement that the assessment shall have been made within a prescribed statutory period of limitations are not the same. To bring this assessment within

the terms of Section 278 (d), it must be determined that the assessment was made within a prescribed period of limitation.

It should be noted that the Revenue Act of 1917, c. 63, 40 Stat. 300, contained no period of limitations as to assessment or collection. The Revenue Act of 1918, c. 18, 40 Stat. 1057, which was in effect when the tax in the instant case was assessed, also contained no provision limiting the time for the assessment and collection of taxes imposed under the Revenue Act of 1917. It seems, therefore, that under any view of the facts in the instant case an assessment of 1917 taxes made in 1920 could not fulfill the requirements of Section 278 (d), for the reason that it was made when there was no period of limitation applicable to such assessment.

The limitation provisions contained in Section 250 (d) of the Revenue Act of 1921 (pp. 41–42, *infra*), Section 277 (a) (2) of the Revenue Act of 1924 (p. 42, *infra*), and Section 277 (a) (3) of the Revenue Act of 1926 (p. 45, *infra*), are to the effect that taxes imposed under the Revenue Act of 1917 shall be assessed within five years after the return was filed. These provisions clearly relate to assessments which had not been made at the time of the passage of the Acts in which they appear, and are not such statutes as should be consulted for the purpose of determining whether an assessment made in 1920, prior to the passage of

any of the Acts in question, has been made "within the statutory period of limitation properly applicable thereto."

But, assuming that the limitation provisions in Acts passed subsequently to the making of the assessment were applicable, there is excluded from their operation all cases where there has been a failure to file a return or where a false and fraudulent return has been filed with intent to evade tax. In such cases the assessment can be made "at any time." Section 250 (d) of the Revenue Act of 1921 (pp. 41–42, *infra*); Section 278 (a) of the Revenue Act of 1924 (p. 43, *infra*), and Section 278 (a) of the Revenue Act of 1926 (p. 45, *infra*). The only difference in the language of these provisions is that the Revenue Act of 1921 makes use of the phrase "failure to file a required return," whereas the later Acts use the phrase "failure to file a return." The Circuit Court of Appeals considered this difference in language immaterial. In view of the fact that under all three statutes the five-year period of limitation runs from the filing of "the return" and not "the required return," it is clear that the change in language is not significant.

In the instant case the only return which could have set in motion the five-year period of limitation upon assessment would have been a return filed in behalf of the taxpayer in accordance with the requirements of Section 13 (b) of the Revenue Act of 1916 as amended by the Revenue Act of 1917 (p. 41, *infra*), and with the requirements of Article

61 of Regulations 33, Revised (p. 49, *infra*). No such return was filed. The former secretary of the Updike Grain Company was aware of these requirements but neither he nor any other officer or stockholder filed a return for the corporation under the provisions of the Revenue Act of 1917. (R. 87–95.)

In the instant case it was contended in the courts below that returns filed in behalf of the corporation under the Revenue Act of 1916 and the Revenue Act of March 3, 1917, for the fiscal period ended June 30, 1917, served to set in motion the statute of limitations, or, in the alternative, that returns prepared in the Internal Revenue Bureau, or the report of the Revenue Agent on the basis of which the assessment was made, constituted returns which set in motion such statute of limitations. The District Court adopted the view that the agent's report constituted "the return," but the Circuit Court of Appeals rejected both contentions and conceded that this was a "no return" case, as it had under similar facts in *Updike* v. *United States,* 8 F. (2d) 913, certiorari denied, 271 U. S. 661.

Little argument is required to establish that a return prepared by the Commissioner or by a revenue agent or the latter's report of an investigation of tax liability is not such a return as will set in motion the statute of limitations against the Commissioner or the taxpayer. The Revenue Acts place upon the taxpayer the *duty* of filing a return and he is penalized for failing to do so. Furthermore, the *filing* of the return marks the beginning of the statu-

tory period of limitation. The act of the Commissioner in placing a return prepared by him or by one of his agents in his own files would lack the formality necessary to start the running of the statute. Inasmuch as the statute is intended to benefit the taxpayer, he should have notice of the act which marks the beginning of the period. He would be without notice of the time or even the approximate time when a return was prepared and filed by the Commissioner. It is only with respect to the return prepared by the taxpayer that any significance can be attached to the *filing* of the return, for by that act the taxpayer places his return beyond his control and within the Commissioner's control. It should be remembered that the Government can assess a tax without any return whatever. *United States* v. *Haar* (C. C. A. 5th), 27 F. (2d) 250. It may likewise bring an action to collect taxes without an assessment. Section 278 (a) of the Revenue Act of 1926 specifically so provides. See also *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Chamberlin,* 219 U. S. 250; *United States* v. *Ayer* (C. C. A. 1st), 12 F. (2d) 194.

Nor did the returns prepared and filed for the corporation under the Revenue Act of 1916 and the Revenue Act of March 3, 1917, meet the requirements of the statute as to the filing of returns under the Revenue Act of 1917. The Revenue Act of 1917 imposed taxes at increased rates and contained changed provisions as to corporations. The

regulations of the Treasury Department, Article 61 of Regulations 33, Revised (p. 49, *infra*), specifically required that corporations which had dissolved in 1917 prior to the passage of that Act should file returns under it on forms prescribed for that Act and pay the taxes due, obtaining credit for the taxes previously paid on returns filed prior to the passage of the Revenue Act of 1917. The validity of these regulations has been sustained in *Updike* v. *United States, supra; Beam* v. *Hamilton* (C. C. A. 6th), 289 Fed. 9.

An examination of the various periods of limitation discloses without doubt that it has been the intention to divide taxpayers into two classes: (1) those who in good faith file the returns required by the law imposing the tax, and (2) those who fail to file the required returns or file false and fraudulent returns with intent to evade tax. As to the first class, the law provides that taxes imposed under the Revenue Act of 1917 shall be assessed within five years after the return was filed, and under Section 278 (d) of the Revenue Act of 1926 that collection must be made within six years after assessment. This period of limitations was conferred upon a class of taxpayers who had complied with the law. It was an act of grace on the part of the Government. *In re McClure Co.,* 21 F. (2d) 538, 540. As to the second class, to which the Updike Grain Company belongs, no benefit was conferred, and the assessment could be made "at any time."

It follows that the assessment in 1920 was not one which was made within any prescribed period. An assessment which can be made "at any time" is not made within "a statutory period of limitation properly applicable thereto" within the meaning of Section 278 (d). To hold otherwise would be to disregard the ordinary meaning of the words employed. The word "period" means a stated interval of time. *People ex rel. Healy* v. *Leask,* 67 N. Y. 521, 528; Words and Phrases, 3rd Series, p. 946. The word "limitation" used with reference to time means the time within which an action may be brought or a thing done. 37 Corpus Juris 664; *Keyser* v. *Lowell* (C. C. A. 8th), 117 Fed. 400, 403. The phrase "statutory period of limitation" is commonly thought of in terms of years, months and days.

In reaching the conclusion that Section 278 barred this proceeding, the Circuit Court of Appeals seems to have relied chiefly upon changes introduced by Section 277 (a) (1), (2) and (3) of the Revenue Act of 1926 (pp. 44–45, *infra*), as showing an intent on the part of Congress to fix one period (for example, five years) for the initial move against the taxpayer, whether by assessment or by suit without assessment, and a different period (for example, six years) for the second move, namely, distraint or court proceedings after assessment. The changes made in Section 277 (a) (1) and (2) of the Revenue Act of 1924 (pp. 42–43,

infra) by the Revenue Act of 1926 was the introduction of the words "without assessment" after the words "no proceeding in court," so that Section 277 (a) of the latter Act provides merely that no proceeding in court without assessment shall be begun after a designated period.

It is submitted that this construction, which for reasons stated above is contrary to the plain language of the section, is not justified on the ground that it represents the probable intent of Congress. It was no doubt the intention of Congress (where the taxpayer had complied with the law in filing an honest return) to prescribe one period for assessment and another period for collection, but the language of the section does not show that it was its intention to prescribe two periods in every instance.

In view of the fact that assessments in fraud cases as well as in "no return" cases can be made at any time (Section 250 (d), Revenue Act of 1921; Section 278 (a), Revenue Act of 1924, Section 278 (a), Revenue Act of 1926 (pp. 41, 43, 45, *infra*)), the more reasonable inference is that Congress did not intend to restrict the Government in such cases. Without strong indication to the contrary, it should not be considered that Congress intended to place any time limit upon the Government's right to enforce collection from a taxpayer whose intent has been to defraud the Government.

The construction of Section 278 (d) in the manner advocated by the Circuit Court of Appeals would have the effect of barring the Government's right six years after the assessment in such cases notwithstanding the apparent purpose of the provision to extend rather than to curtail the Government's rights. *Cf. Russell* v. *United States, supra.*

The result of the Circuit Court of Appeals' construction of Section 278 (d), moreover, is to bar retroactively a proceeding which, except for the passage of the Revenue Act of 1926, could have been instituted at any time, for Section 250 (d) of the Revenue Act of 1921 provided that collection as well as assessment could be enforced at any time where no return was filed, and this situation was not altered by the passage of the Revenue Act of 1924, for that Act did not affect an assessment made in 1920. *Russell* v. *United States, supra.* Consequently, at the time of the passage of the Revenue Act of 1926 the Government had an unlimited time within which to start this proceeding.

This Court has held that a statute of limitations should not be given retroactive effect or be construed to change the status of claims fixed under earlier provisions unless the legislative purpose to do so clearly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160; *Russell* v. *United States, supra.* The mandate of Congress in the instant case is not so evident as to require a construction of Section 278 (d) which will have this effect, particularly in

view of the fact that the statute would not in that event have given the United States a reasonable time after its enactment to institute this proceeding. *Terry* v. *Anderson, supra.* The rule of construction to the effect that the United States is not bound by a statute of limitations unless it clearly applies should be given effect here. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310.

It may be urged that the case is in some manner controlled by Section 1106 (a) of the Revenue Act of 1926 (p. 48, *infra*). That section, however, can operate only upon existing statutes of limitations. Unless there is involved a case where some statute of limitations already operates as a bar, Section 1106 (a) could not apply. It is our contention that no statute of limitations bars this suit by the United States against the stockholders of the dissolved corporation, and that none would have barred a suit against the corporation if it had remained in existence. If that is true, then Section 1106 (a) is without application here.

Even if Section 1106 (a) had any application to this case, the repeal of the section as of the date of its enactment by Section 612 of the Revenue Act of 1928 (p. 49, *infra*), has eliminated it as a defense. The plain purpose of the latter provision was to restore conditions to the exact status which they would have occupied had Section 1106 (a) of the Revenue Act of 1926 never been enacted.

In *United States* v. *John Barth Co.*, 279 U. S. 370, the question was raised as to whether it was within the power of Congress to enact Section 612 of the Revenue Act of 1928, but this Court decided the case without passing upon that question. The Government's position, then and now, is that Congress has the power to repeal retroactively a statute which extinguishes a liability for taxes. Support for that position is found in cases which recognize that Congress has power to ratify and legalize the collection of an unauthorized tax. *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinszen & Co.*, 206 U. S. 370. The case of *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, which may be cited as authority to the contrary, is not in point. It dealt not with taxes, but with a statute limiting the time for filing claims for damages against a railroad.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 13 (b) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 771, which is incorporated in the Revenue Act of 1917 by Section 1001, c. 63, 40 Stat. 300, 325, of that Act, provides:

> SEC. 13. (b) Every corporation, * * * subject to the tax herein imposed, shall * * * render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, * * * where are kept its books of account and other data from which the return is prepared, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under

any return made under this Act for the taxable year 1921 * * * and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, * * *; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides in part as follows:

SEC. 277. (a) * * *.

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C., Title 26, Sec. 1058.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55–56, 58 59, 61, 113, 121, provides in part as follows:

SEC. 2. (a) When used in this Act—

* * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act. U. S. C. App., Title 26, Sec. 1262.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in

section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * * (U. S. C. App., Title 26, Sec. 1048.)

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment. (U. S. C. App., Title 26, Sec. 1049.)

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector. (U. S. C. App., Title 26, Sec. 1050.)

SEC. 277. (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C. App., Title 26, Sec. 1058.)

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the

period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter. (U. S. C. App., Title 26, Sec. 1069.)

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

SEC. 1122. (b) The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of

injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions. (U. S. C. App., Title 26, Sec. 1257.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 875, provides in part as follows:

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Article 61, Treasury Regulations 33, Revised:

Corporation dissolved prior to October 4, 1917.—A corporation which was dissolved in 1917, prior to passage of the war-revenue act of October 3, 1917, is subject to tax under the act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the act of October 3, 1917. (*Brady et al.* v. *Anderson,* 240 Fed. 665.) A corporation so situated will make a return on revised form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have

paid any excess profits tax under the act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the act of October 3, 1917.

Article 10, Treasury Regulations 41:

Corporations.—Every domestic corporation which has for the taxable year a net income of $3,000 or more is, unless exempt under article 13, required to make a return and to pay the tax, if any.

Every foreign corporation which has for the taxable year a net income of $3,000 or more from sources within the United States is, unless exempt under article 13, required to make a return and to pay the tax, if any.

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